

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-02-0023
)	
B.T. Produce Co., Inc.)	
)	
Respondent)	
)	
	and	PACA Docket No. APP-03-0009
Louis R. Bonino,)	
)	
Petitioner)	
	and	PACA Docket No. APP-03-0011
Nat Taubenfeld)	
)	
Petitioner)	

Decision

In this decision I find that in PACA Docket No. D-02-0023, Respondent B.T. Produce Co., Inc.¹ willfully violated the Perishable Agricultural Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector on at least 42 occasions. The violations committed were serious and extended over a significant period of time, and were likely committed to secure a competitive advantage over others. However, after weighing the statutory factors, I am not revoking B.T.'s

¹ In PACA Docket No. D-02-0023, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and B.T. Produce, Inc. is the Respondent. In PACA Docket No. APP-03-0009, Louis R. Bonino is the Petitioner, in PACA Docket No. APP-03-0010, David Taubenfeld was the Petitioner, and in PACA Docket No. APP-03-0011, Nat Taubenfeld is the Petitioner.

license, but am instead imposing a civil penalty of \$360,000 in lieu of a six month suspension of their license. I also find that both Louis Bonino, in PACA Docket No. APP-03-0009, and Nat Taubenfeld, in PACA Docket No. APP-03-0011, are responsibly connected to B.T.²

Procedural History

On August 15, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, issued a Complaint charging Respondent with “willfully, flagrantly and repeatedly” violating section 2(4) of the Act, and requesting that Respondent’s PACA license be revoked. On September 30, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Respondent asked that the claims be dismissed or that an oral hearing be scheduled. On December 2, 2002, former Chief Judge James W. Hunt set the case for a hearing to commence on August 4, 2003.

Meanwhile, on March 31, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Louis R. Bonino, David Taubenfeld and Nat Taubenfeld were responsibly connected with Respondent. On April 17, 2003, Petitioners each filed appeals of those determinations. On June 20, 2003, Judge Hunt consolidated the disciplinary case against Respondent and the petitions challenging the responsibly connected determinations for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

² With respect to Petitioner David Taubenfeld, subsequent to the conclusion of the hearing the PACA Chief withdrew his determination that David Taubenfeld was responsibly connected to B.T. during the time period the violations were alleged to have been committed. Accordingly, on January 28, 2005, I granted David Taubenfeld’s motion to dismiss his petition for review.

The consolidated matter was reassigned to me on July 10, 2003. The hearing was continued to December 1, 2003 due to the illness of David Taubenfeld. I conducted a hearing in New York City from December 8 through 11, 2003, February 17-20, 2004, and August 3 through 4, 2004.³ Christopher Young-Morales and Ann Parnes of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and Jeffrey Chebot represented Respondent in the disciplinary case and the Petitioners in the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background⁴

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party

³ Although the hearing was scheduled to be completed in December, continuances were necessary due to the recurring illness of David Taubenfeld. Mr. Taubenfeld was finally able to testify on August 3, 2004. Tragically, Mr. Taubenfeld passed away in October, 2005.

⁴ A significant portion of this section is adapted from my decision in Kleiman & Hochberg (appeal pending before the Judicial Officer)

up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of

USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the FBI. Tr. 60⁵. To avoid a prison term, Cashin agreed to cooperate with the investigation, and to wear or carry devices allowing him to record, either through audio or visual means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 61-62, CX 5. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the day's events, principally which inspections he received bribes for and for how much. Tr. 61-62. He turned over the money he received as bribes during each of these meetings. Id. These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing. CX 6-19. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by

⁵ "Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's exhibits are marked RX and are sequentially lettered (A-Z, AA-SS). The exhibits for the responsibly connected cases are marked RNT 1-11 and RLB 1-9 for Nat Taubenfeld and Louis Bonino, respectively.

misreporting some aspect of what he observed, there is not a shred of evidence on these forms as to what Cashin did in exchange for the bribes.

Cashin testified that for each of the 42 inspections that he conducted at B.T. between the time of his arrest and his resignation, he was paid \$50 in bribes by William Taubenfeld, who at that time was the secretary, a director, and part owner of the company. He stated that in 60% to 75% of these inspections he gave “help” to B.T., in the form of overstating the percentage of defects, overstating the number of containers inspected, or mis-stating the temperatures of the load. Tr. 50-53, 58.

William Taubenfeld, who is the son of Nat Taubenfeld and the brother of David Taubenfeld, was indicted on October 21, 1999 for thirteen counts of Bribery of a Public Official. On May 16, 2001, he pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to Cashin on July 14, 1999. In his plea, he stated that he paid the bribes “with the expectation that on some occasions he would give me favorable treatment by downgrading his rating of produce that he was inspecting.” RX QQ at p. 12. William Taubenfeld was sentenced to fifteen months in prison, and 3 years probation, and was ordered to pay a \$4,000 fine and \$14,585 in restitution. Id., CX 4, Tr. 257-258. William Taubenfeld’s connections with B.T. were severed shortly after his arrest, with his ownership rights transferring back to Nat Taubenfeld. He did not appear at the hearing.

B.T. has established itself as a handler of second rate, third rate and distressed produce. Tr. 686-687, 690-691.⁶ Much of the produce the company handles has been rejected by other produce houses or stores. B.T. has a reputation for being able to sell

⁶ Or as David Taubenfeld stated: “We are not a house of quality. We are a house of seconds and rejections and off-quality product.” Tr. 1789.

lower grades of produce, or produce where the load has significant defects, for good value, so that others send them their lower quality merchandise because they are able to make them more money than they could make otherwise. A number of witnesses testified that they were well aware that the loads inspected by Cashin contained many problems, since that was why they sent the load to B.T. in the first place, and that they were not surprised when they saw the inspection reports. Further, they were generally pleased with the results achieved by B.T. in the sale of the load.

Nat Taubenfeld⁷, the president of B.T., has been in the fruit and vegetable business since he arrived in this country in 1949. In 1990, he set up the current B.T. business (he had used the same name in a previous business a few decades earlier) with Louis Bonino as his 30% partner. He worked the fruit and vegetable side of the business, while Louis Bonino primarily served as office manager, supervising the employees and managing the money. Tr. 689-690. He brought William Taubenfeld into the business from the time of its establishment, and gradually brought his son David in as well.⁸ Tr. 692-693. He gave both William and David shares in the business, although no compensation was involved for these transactions and no share certificates were issued. Tr. 695.

Nat Taubenfeld stated that he was unaware that his son was making illegal payments to Cashin. He further stated that he had never given money to any USDA inspector to “attempt to influence the result of that produce inspection.” Tr. 698.

However, he did indicate that on a number of occasions he gave Cashin money, not to

⁷ His given name is Naftali but he is universally referred to in his business and in this case as Nat.

⁸ While David Taubenfeld was listed as a partner in the company, he apparently was not personally aware of that fact, and his role in the company was clearly that of an employee rather than a principal.

influence inspections but as an act of charity in response to solicitations from Cashin for loans to help Cashin in his relationship with his girlfriend. Tr. 702-704. He was not sure of the time period for these “loans.” Cashin had testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Tr. 42-44. While the payments Nat Taubenfeld made to Cashin are not the subject of this case, it has some disturbing implications concerning his treatment of inspectors, and his judgment, that have a bearing in fashioning a remedy in this matter.

There was never any evidence introduced indicating that Louis Bonino knew anything about the bribes William Taubenfeld paid to Cashin. It is clear that Mr. Bonino was not involved in the buying and selling of fruit and vegetables, and basically managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer, and who owned a trucking business before joining Nat Taubenfeld in forming B.T., signed checks and contracts, put in surveillance measures, and managed office staff at B.T. Tr. 595-602. He was a 30% owner in the company from the time it was created in 1990, and is its vice-president. RLB 1. As part of his duties, he also handled the thirty to forty reparations cases that arose as a result of the Forbidden Fruit operation, and which resulted in B.T. paying reparations of \$400,000 to \$500,000. Tr. 605-607. Mr. Bonino expressed surprise as to why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T., and stated he was not aware of the illegal payments. Tr. 608-609.

Much of the hearing consisted of testimony concerning the 42 inspection certificates, and whether Cashin in fact “helped” B.T. with respect to any of the loads of produce that were the subject of these certificates. Since Cashin steadfastly maintained that he had no specific memory of how he helped B.T. in any particular inspections, and since Complainant called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by Cashin’s actions, there has been little to no reliable proof that any of these certificates were in fact inaccurate. On the other hand, B.T. personnel testified that each of the certificates was accurate, and their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information in the inspection certificates was consistent with what they expected, given what they knew of the condition of the loads.

Complainant attempted to buttress Cashin’s credibility by playing an audiotape of one of his inspections at B.T. on April 23, 1999, where William Taubenfeld was also present. CX 21. The audiotape was not of the highest quality. The inspection reflected in the discussion was memorialized in the inspection certificate admitted as CX 8. While the tape was difficult to hear, it is clear that William Taubenfeld suggested the percentages of defects in a load of tomatoes, and that Cashin reported the suggested defects in his inspection certificate. Cashin also indicated that the practice of pointing out problems with a load was not unusual. “It’s very commonplace for a member of the industry, whether he pays or doesn’t pay, to pull defects out of a box and say look at this, look at this, look at that, look what I found.” Tr. 973. It was also common for people in the produce business to suggest to the inspector what percentages of defects were in a load. Tr. 974. Cashin’s conclusion that he “helped” B.T. with regard to this inspection

was based on the fact that Cashin put down the very numbers suggested by William Taubenfeld on the inspection form, and are not based on any recollection that those numbers are incorrect. Id.

While Complainant called no witnesses, other than Cashin, who could have corroborated that any particular inspection certificate was falsified, Respondent's witnesses testified as to their recollection of each transaction. Not only did Nat and David Taubenfeld testify regarding loads they handled that were subject to one of the 42 inspection certificates, but office manager Robin Long, salesman Michael Bonino (who is the son of Petitioner Louis Bonino), Steven Goodman, who was affiliated with the shipper JSG, Peter Silverstein, the president of Northeast Trading, and Harold Levy, a fruit broker at Northeast Trading, all testified as to their roles in many of these transactions.

It is worth discussing several of the transactions in a little more detail. For example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the complaint, which was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which was received by B.T. two days earlier. On the receiving ticket, Nat Taubenfeld noted in his own handwriting that the plums were "very ripe," RX A, p. 1, Tr. 1095. This indicated to him that "the merchandise had to be moved quick, sold under any price, and not play around with it." Id. The shipment was "pas" or price after sale, indicating that a final price on the merchandise was not to be calculated until the produce was sold or otherwise disposed of. Tr. 1089. The inspection certificate finding of serious damage to 18% of the load, RX A, p. 6, was not inconsistent with his observations that the plums

were very ripe. While Oppenheimer suggested that the price be \$9 per box of plums, they agreed to an adjustment of \$8 per box after factoring in the prices B.T. was able to get for the plums (averaging \$8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld's opinion, B.T. suffered a net loss on the transaction. Tr. 1098-1100.

Another transaction worth mentioning is the June 14, 1999 inspection of cherries from Northeast Trading. RX Q. Nat Taubenfeld indicated on the bill of lading, RX Q, p. 3, that the cherries were "soft", as opposed to the firm cherries that customers' desire. Tr. 1148. He testified that he received an average of \$5.26 per box under the market price for these cherries, and that he received a \$6 reduction from Northeast Trading as a result. He did not dispute the inspection certificate indicating 21% defects. Peter Silverstein, the president of Northeast Traders, testified with respect to that same shipment, that he had no indication that there was anything wrong with the inspection certificate, Tr. 1648, and that the shipper did not appeal the inspection, Tr. 1639. He thought that it was likely that the older cherries in this shipment were competing against younger and fresher cherries. Tr. 1648-1649.

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. had a very flexible relationship and that sometimes when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. would be allowed to recoup a larger profit sometime down the road, to make up for a lesser profit or a loss for a different load. Tr. 1089-1092. He pointed out that "the relationship between the shipper and us plays a tremendous role in our business." Tr. 1092. "[I]t's one hand washes the other. Sometimes you can make a few dollars more,

and sometimes the shipper says that's what I can give you and that's what we do.” Tr. 1100. David Taubenfeld had a more dramatic explanation—“It’s a lot of begging. There’s a lot of begging to our customers and pleading and fighting over prices and things like that.” Tr. 1797. David Taubenfeld added that they often “work for nothing” on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time. Tr. 1945.

Even though Complainant was unable to demonstrate that any particular inspection certificate was falsified to B.T.’s benefit, the only probative evidence offered in this matter as to the purpose for the illegal payments was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as-needed basis. The portrayal by Respondent of its shippers as a contented lot satisfied with the results of inspection certificates is belied by the fact that Operation Forbidden Fruit generated a significant number of reparations actions against B.T., and something in the vicinity of \$500,000 in reparations payments by B.T. Tr. 605-607. Certainly, even if loads which were expected by the shipper to be seconds or worse were falsely downgraded even further by the inspector, there would be lower price expectations on behalf of the shipper, and would possibly result in an apparently exceptional job in selling damaged goods that could inure to B.T.’s benefit in terms of future business. Tr. 1302-1305.

David Nielsen, a senior marketing specialist in the PACA Branch’s New Brunswick, New Jersey office, testified as to his role in the investigation. His methodology basically consisted of reviewing documents provided the PACA Branch from the FBI and from USDA’s Inspector General’s Office. Tr. 247. He examined the

license files of B.T., and the complaint history of B.T. as well as the documents that were supplied to him. Tr. 252. He went to B.T.'s premises on March 26, 2001 as part of his investigation, particularly seeking out the purchase and sales records related to the inspection certificates that he had been given by the FBI and IG. He spent about two weeks on site in March and April, and returned for another two weeks several months later. Tr. 279. Substantial requested records were turned over to him. While Mr. Nielsen testified that he produced a report of investigation that B.T. violated section 2(4) of the PACA by paying bribes to a federal inspector to falsify 42 inspection certificates, he based that conclusion on what he had received from the FBI and the IG, and admitted under cross-examination that there were no records of B.T. indicating any evidence of falsification of inspection reports, nor were there any records supporting a finding that B.T. paid bribes. Tr. 284-287. Likewise, although he stated in his report that the 42 inspection certificates were used to obtain price adjustments, his report was not accurate. Tr. 290-291. He later admitted that in other areas the conclusions in his investigative report were not always accurate, Tr. 308 (no adjustment on the load from Trinity Fruit, RX I, even though his inspection report said that a falsified inspection was used to get an adjustment); Tr. 310 (no adjustment on the load of Garden Fresh Mangos or Mission produce mangos even though his inspection report said that a falsified inspection was used to get an adjustment); and that his statement in his investigation report about falsification was "an assumption . . . my understanding of the information that I had been given." Tr. 321.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant's sanctions witness. Mr. Koller testified that the payment of bribes by B.T.

“to a produce inspector constitutes willful, repeated and flagrant violations of the PACA.” Tr. 489. Mr. Koller further testified that bribing an inspector “corrupts the inspection process,” Tr. 490, and violates the fair trade practices provisions of PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. since William Taubenfeld was an officer and employee of B.T., and since his actions were within the scope of his employment. Tr. 490-491. He pointed out that when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions. Tr. 496, RX QQ.

Mr. Koller recommended that an appropriate sanction would be revocation of B.T.’s license. Tr. 499. He stated that civil penalties were not appropriate here, because “bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and. . . the inspection process and its credibility.” Tr. 502. He also stated that revocation was warranted because of the length of time the bribery had continued and because “USDA has consistently recommended license revocation in the case of bribery . . .” Tr. 503. Even in instances where a bribe was paid and the particular inspection certificate was accurate, there is a benefit to the bribe payer, according to Mr. Koller, because the bribe payer could benefit at a later time, Tr. 516, and because bribery creates an “unlevel playing field.” Tr. 591. Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Department was not “able to identify a single one of the 42 inspections here that was falsified . . .” Tr. 533.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable produce. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables.

Section 499b provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker “has violated any of the provisions of section 499b,” the Secretary may, “if the violation is flagrant and repeated . . . revoke the license of the offender.” 7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. “In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues . . . giv[ing] due consideration to the size of the business,

the number of employees, and the seriousness, nature and amount of the violation.” 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides: . . . the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.”

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person “responsibly connected” to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license “has been revoked or is currently suspended” for as long as two years, and then only upon approval of the Secretary. Id.

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Findings of Fact

1. B.T. Produce Co., Inc. (Respondent) is a New York Corporation whose business and mailing address is 163-133 Row A, Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 36.

3. Cashin was one of numerous USDA produce inspector's who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 60. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 60-62 , CX 5.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI

agents would prepare a “302” report summarizing what Cashin told them about that day’s activities. Tr. 61-62; CX 6-19.

5. Beginning in 1994, and more specifically from the period between March 24, 1999 through August, 1999, William Taubenfeld paid bribes to William Cashin. In particular, he paid Cashin \$50 bribes for each of the 42 inspections cited in the Complaint.

6. The bribes were paid with the expectation that Cashin would occasionally downgrade the quality of the merchandise he was inspecting, presumably to give B.T. a competitive advantage. RX QQ.

7. There was no specific evidence that any of the 42 inspections cited in the Complaint were falsified.

8. The evidence supports a finding that there were transactions where B.T.’s position was improved by the falsification of inspections as a result of bribes paid to Cashin.

9. During the period in which he paid bribes to Cashin, William Taubenfeld was secretary, a director and a significant shareholder in Respondent. CX 1.

10. During the period described in paragraph 9, Nat Taubenfeld was president, a director, and a significant shareholder in B.T. CX 1. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T., particularly in the area of buying and selling of fruit.

11. During the period described in paragraph 9, Louis Bonino was the vice-president, a director and a thirty percent shareholder of B.T. CX 1. Louis Bonino was

involved in the day-to-day operations of B.T., principally managing the office aspect of operations.

12. There is no evidence that Nat Taubenfeld or Louis Bonino knew that William Taubenfeld was making illegal payments to William Cashen.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by William Taubenfeld constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 42 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 180 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of \$360,000.

5. Nat Taubenfeld is responsibly connected to Respondent.

6. Louis Bonino is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, William Taubenfeld, paid bribes to William Cashin in each of the 42 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the

Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that while there is no specific evidence that any of these 42 inspection certificates were falsified, that the evidence shows that the illegal payments were made with the expectation that B.T. would receive some help from Cashin in the form of falsified inspection reports, and that while Complainant provided no proof of any specific falsification, the fact that significant reparations were paid by B.T. as a direct result of Operation Forbidden Fruit cannot be ignored. I find that the purposes of the PACA can best be achieved in this matter by the assessment of a significant civil penalty, rather than license revocation. Therefore, I am imposing a civil penalty of \$360,000 against Respondent in lieu of a 180-day suspension of its license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Nat Taubenfeld or Louis Bonino by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Nat Taubenfeld and Louis Bonino are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 42 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. William Taubenfeld, the secretary, director and a major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 42 occasions.

There is no evidence which would contradict a finding that William Taubenfeld made \$50 payments to William Cashin in the 42 instances recited in the complaint. While William Taubenfeld's plea was only for a single count of bribery based on three

inspections for which he was bribed on July 14, 1999, Cashin's undisputed testimony as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that the practice of bribing Cashin was part of a long-standing practice.

It is likewise undisputed that William Taubenfeld was secretary of Respondent at the time the violations alleged in the Complaint were committed, and that he was a significant shareholder of Respondent.⁹

B. Respondent is liable for the violative acts of William Taubenfeld that were committed within the scope of his employment or office.

Section 16 (U.S.C. §499p) of the Act that states that "in every case" "the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office," "shall be deemed the act, omission, or failure" of the employer. There is no disputing that William Taubenfeld paid bribes to William Cashin for the 42 inspections. While there was no evidence indicating that the money used to bribe Cashin came from company funds, nor was there any specific evidence that either Nat Taubenfeld or Louis Bonino was aware of the bribery, the purpose behind the bribes, as undisputedly testified to by Cashin and confirmed by the plea of William Taubenfeld, was to benefit Respondent, with the hope that produce inspected by Cashin would be downgraded to the benefit of B.T.

Thus, in Post & Tauback, Inc., 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 "provides an identity of action between a PACA licensee and the

⁹ B.T.'s filings with the PACA Branch indicate that an entity known as "Taubenfeld Brothers Produce, Inc." was 70% owner of B.T. at the time of the violations, but apparently no stock certificates were ever issued to memorialize this, nor was Nat Taubenfeld even aware that this entity existed. It is clear, though, that Nat Taubenfeld and his son William, along with Louis Bonino, were the principal owners of the company.

PACA licensee’s agents and employees.” *Id.*, at 820. As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if other principals in the company, as well as its employees, were unaware of William Taubenfeld’s actions, the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In Post & Taback, Inc., the Judicial Officer unequivocally held that “as a matter of law, . . . violations by [an employee] . . . are . . . violations by Respondent, even if Respondent’s officers, directors, and owners had no actual knowledge of the . . . bribery . . . and would not have condoned [it].” *Id.*, at 821. If a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company’s officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful “to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction.” Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in Post & Taback:

A produce buyer’s payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of

eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

Id., at 825. Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, has recognized that there is a general commercial duty to deal fairly which is required of all PACA licensees. In Sid Goodman and Co., Inc., 49 Agric. Dec. 1169, 1183-4 (1990), aff'd, 945 F. 2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that "members of the produce industry have an obligation to deal fairly with one another" and goes on to hold that commercial bribery is "unfair" in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. See e.g., JSG Trading Corp., 58 Agric. Dec. 1041 (1999), aff'd 235 F. 3rd 608 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 458 (2001). I followed this same line of reasoning in Kleiman & Hochberg (appeal pending before the Judicial Officer).

D. The bribery violations committed by Respondent were willful, flagrant and repeated.

Complainant easily meets its burden of showing that the bribes paid by William Taubenfeld constituted willful, flagrant and repeated violations of the PACA.

A violation is "willful" if "irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the

requirements of a statute.” PMD Produce Brokerage Corp., 60 Agric. Dec. 780, 789 (2001). Here, William Taubenfeld, and therefore Respondent, knew that the payments made to Cashin in the 42 inspections involved in this case were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were “flagrant.” In Post & Taback, supra, the Judicial Officer found, citing the dictionary definition of “flagrant” as covering conduct “conspicuously bad or objectionable” or so bad that it “can neither escape notice nor be condoned,” that “payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture’s produce inspection system and disrupt the produce industry.” Id., at 829-30. Here, where the purpose of the bribes undisputedly would be to gain an occasional competitive advantage over a grower or a seller, the long-standing practice of Respondent bribing Cashin easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Complainant demonstrated that 42 instances of bribery occurred between March and August, 1999, and that there was every indication that this practice had begun long before Operation Forbidden Fruit. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of \$360,000

Complainant has requested the imposition of license revocation as an appropriate sanction for these violations, contending that, in essence, for any bribery conviction under PACA revocation, rather than imposition of a civil penalty or other remedy, is the only appropriate sanction. Respondent, on the other hand, urges that, if I find that violations have been committed, then I should assess a penalty of \$2,000 for each of the instances of bribery, for a total civil penalty of \$84,000. After weighing the statutory and regulatory factors, I conclude that a \$360,000 civil penalty in lieu of a six-month license suspension is appropriate.

While Complainant failed to show any particular instance in which an inspection certificate was falsified by Cashin as a result of the bribes he was being paid by William Taubenfeld, it is abundantly clear that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T., and to the detriment of shippers, sellers or growers. This is a significant degree more serious, in my estimation, than a situation, such as was present in Kleiman & Hochberg, where there was no reliable evidence that any certificates were ever falsified, and the consistent and reliable testimony supported a finding that bribes were only paid to get the inspectors to conduct the inspection in a timely manner. Here, the bribing official admitted in his plea that the purpose of the bribes was to get Cashin to downgrade produce on occasion.

In addition, the attitude of Respondent's president, Nat Taubenfeld, towards the making of payments to a USDA inspector does not reflect a corporate attitude consistent

with the PACA. Although illegal payments made by Nat Taubenfeld were not a subject of the complaint, Cashin testified that before William Taubenfeld paid him bribes, Nat Taubenfeld paid him as well, both at B.T. and in his prior workplace. Tr. 48-50. Nat Taubenfeld testified that he did indeed give Cashin several hundred dollars over time but that he did it out of charity, after Cashin told him he had “problems” with a girlfriend, that it “was always pretty much the same story,” and that these “loans” were not given with the expectation of receiving anything in return. Tr. 711-713. Even if Nat Taubenfeld was motivated by charitable intentions, it is either extremely naïve or extremely cynical for the president of a produce company to pay such gratuities to the very person who inspects his produce.¹⁰

Even though the violations in this case are more severe than those in Kleiman & Hochberg, I find that the goals of the PACA can be readily met by the imposition of a \$360,000 civil penalty in lieu of a six month suspension than by revocation of B.T.’s license. Complainant contends, in essence, that whenever an individual in a produce company pays a bribe to a produce inspector revocation is mandated, and implies that that is the Judicial Officer’s sanction policy as well. Comp. Br. At 35. While there is no question that bribery is one of the most serious, if not the most serious, violations of the PACA, the fact is that there is a permissible range of sanctions under the statute. By the specific terms of 7 U.S.C. §499h(e), even where a violation is serious enough to warrant a license revocation, the Secretary is given the authority to instead impose a civil penalty “not to exceed \$2,000 for each violative transaction or each day the violation continues.” While the Secretary must consider “the size of the business, the number of employees, and the seriousness, nature, and amount of the violation,” Id., it is abundantly clear that

¹⁰ I do not include the \$20 farewell gift for Cashin’s “retirement” in this categorization.

Congress gave the Secretary discretion to assess a civil penalty even where the circumstances could justify a license revocation.

Certainly, the Secretary is free, on his own accord or through the Judicial Officer, of establishing a policy that whenever bribes are paid to a produce inspector for the purpose of influencing, either at the time of paying the bribe or at some undefined future occasion, the outcome of a produce inspection, the sanction is revocation, without any option for alternative civil penalties. At this point, neither the Secretary nor the Judicial Officer has established such a policy.

Complainant, primarily through the testimony of its sanctions witness, John Koller, vigorously advocates that revocation is the only appropriate sanction, due to “the detrimental effect that bribery of inspectors has on the produce industry.” Comp. Br. At 37, Tr. 498. However, neither Mr. Koller at the hearing, nor Complainant in its briefs, provides any specific reason why a significant civil penalty will not accomplish the deterrence that is the aim of the statute. While I am required to give “appropriate weight to the recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose,” S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (1991), aff’d 991 F. 2d 803, I am not required to blindly follow these recommendations, particularly when no showing has been made why a civil penalty cannot serve as a “strong sanction” that would deter the bribery of produce inspectors.

In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent’s employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose their jobs, and the fact that the

significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an impact on company ownership than its non-culpable employees.

On the other hand, Respondent's suggestion that an appropriate penalty would be \$84,000, Resp. Br. at 92, based on a \$2,000 civil penalty for each of the 42 inspections cited in the complaint, would result in an inadequate sanction in terms of the types of violations committed, and the duration of the violations. These were very serious violations, which strike at the heart of the produce inspection process. Here, the purpose of the bribes was to give Respondent an economic advantage over other parties to produce transactions. The Judicial Officer has repeatedly imposed serious sanctions when this criterion is met. Thus, in Sid Goodman and Co., Inc., *supra*, the Judicial Officer sustained an administrative law judge's determination that license revocation was appropriate in large part because payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. Similarly, in Tipco, Inc., 50 Agric. Dec. 871 (1991), the decision emphasized that "members of the produce industry have an obligation to deal fairly with one another," *Id.*, at 882, and that utilizing bribery to gain an advantage over competitors was a significant factor in the Judicial Officer's decision to revoke a PACA license.

While there are clearly some factors here that would justify imposition of the ultimate sanction of license revocation, I believe that the imposition of a significant civil penalty would be more consistent with the Act's ultimate aims. In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into

account . . . The United States Department of Agriculture’s sanction policy has long provided that the sanction is determined by examining all relevant circumstances.”

George A. Heimos Produce Company, Inc., 62 Agric. Dec. 763, 797 (2003). As I already discussed, I find that factoring in the serious nature of the violation, the size and nature of the business, including the welfare of its employees, and the likely deterrent effect, the \$360,000 civil penalty is consistent with the PACA.

III. Respondent’s Constitutional Claims are Without Basis

Respondent contends that holding it liable for the actions of William Taubenfeld violates its constitutional rights to due process and equal protection. To the extent that I have the authority to rule on constitutional challenges, I find these claims to be without justification.

Respondent bases its constitutional claims on the Agency’s applying Section 16 of the PACA to hold Respondent liable for the actions of William Taubenfeld, who it classifies as a “rogue” employee. While Respondent is of course entitled to due process, it is clear to me that the literal terms of the statute are intended to apply to just this type of situation—that when a corporate officer and shareholder commits illegal acts on behalf of the corporation then the corporation is liable. See discussion, supra, at 20-21. Section 16 of the PACA is explicit in providing for corporate liability for just this type of situation, and the PACA has been consistently interpreted accordingly. Further, this portion of the act is also consistent with the doctrine of *respondeat superior*. Holding a corporation responsible for the actions of its employees, particularly where the employee is an officer, director and stockholder, and where the admitted purpose of the actions is to

benefit the corporation at a later date, hardly puts a strain on the corporation's constitutional rights.

Respondent's irrebuttable presumption contention also fails. While an irrebuttable presumption would raise constitutional questions, *Landrum v. Block*, 40 Agric. Dec. 922, 925 (1981), the notion that Respondent is responsible for the actions of its employees, let alone someone who is an officer, director and shareholder acting for what he perceives to be the future benefit of the Respondent, and to the possible economic detriment of others engaging in transactions with Respondent, is not offensive to due process.

IV. Both Nat Taubenfeld and Louis Bonino are Responsibly Connected to Respondent

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 180-day license suspension in lieu of the payment of the \$360,000 civil penalty.

A. Nat Taubenfeld

Nat Taubenfeld is the co-founder of Respondent, and has been president, a director and the individual in charge of the produce end of B.T. since its inception. RNT 1, Tr. 678, 684, 698, 700, 716-717. He has participated in the day-to-day management of Respondent from the day he co-founded it, principally running the night shift, buying and selling produce, etc. He communicated to B.T. personnel how he expected them to conduct B.T.'s business, and had a significant role in the hiring and firing of personnel.

Tr. 705-707, 721. His role included requesting inspections from USDA inspectors, and seeking and obtaining price adjustments based on the results of inspections. Tr. 1281, 1298. He brought both of his sons into the business. Tr. 701-703.

Although Nat Taubenfeld is not charged with being directly involved in the violative acts, his actions regarding “charitable” payments to Cashin are not consistent with an individual who instructs his employees on the proper way to do business. Tr. 705-707. There is no dispute that he made numerous payments to Cashin that were not related to the fee that USDA collects for the conduct of inspections. However, since there are no allegations that he made any such payments during the period that is the subject of the complaint, I rule that he has met his burden of showing, under the statute, that he “was not actively involved in the activities resulting in a violation of this Act.”

However, the statute requires not only a showing of non-involvement in the violative activities, but requires an additional showing that the person “was only nominally a partner, officer, director or shareholder.” Nat Taubenfeld fails to meet his burden under this test, as it is clear that he was intimately involved in the day-to-day workings of B.T., that he was considered by company personnel to be the head of the company, and that he was involved in many or most of the decisions involving the produce end of the company. Tr. 669, 684, 1281, 1298. He had the authority to hire and fire, he signed checks (Tr. 705, RNT 6), he made decisions as to what to buy, when to call for inspections, and far more. He does not come close to meeting the test for showing that he was not actively involved in B.T. or that his position was purely nominal.

B. Louis Bonino

There is no evidence that Louis Bonino participated in or was aware of any of the violative activities that are the subject of the complaint. However, Mr. Bonino is unable to meet the burden of the second prong of the responsibly connected definition, as he was a 30% stockholder, vice-president and director of the corporation since he co-founded it with Nat Taubenfeld in 1990. RLB 1.

In particular, Mr. Bonino was directly involved in the day-to-day affairs of Respondent, running the office side of the business. Tr. 595, 605, 652-653. His responsibilities included signing checks, handling cash, signing contracts, hiring, firing and training employees, and overseeing security. He personally was present at Respondent's business address three to four days a week. Tr. 633. He directly handled, on behalf of Respondent, reparation complaints that were filed against it. Tr. 611. While it can be argued that by virtue of his responsibilities he should have discovered the illegal acts of William Taubenfeld and taken action to prevent them, and accordingly should be found to have been "actively involved" in the violative acts, he successfully met his burden of showing that there was no reasonable way he could have known of the illegal payments.

As with Nat Taubenfeld, however, Mr. Bonino is unable to show that he was only "nominally" involved in Respondent's operations. His ownership role, his substantial responsibilities in many aspects of the business, and his authority over employees are inconsistent with a nominal role in B.T.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of \$360,000 in lieu of a 180-day suspension of its license.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 6th day of December, 2005

Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge